

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**CASANDRA SALCIDO, AS NEXT
FRIEND OF MINOR CHILDREN
KHLOE LUCAS AND CAINE LUCAS,
DENISE COLLINS, KENNETH
LUCAS, AMBER LUCAS
INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE
OF KENNETH CHRISTOPHER
LUCAS, DECEASED, AND DEIDRE
MCCARTY, AS NEXT FRIEND OF
MINOR CHILDREN K.J.L. AND T.J.L.
Plaintiffs.**

VS.

CASE NO. 4:15-cv-02155

**HARRIS COUNTY, TEXAS, DEPUTY
DAVID GORDAN, DEPUTY XAVIER
LEVINGSTON, DETENTION
OFFICER BRODERICK GREEN,
DETENTION OFFICER ALICIA
SCOTT, DETENTION OFFICER JESSE
BELL, DETENTION OFFICER
MORRIS THOMAS, AND
DETENTION OFFICER ADAM
KNEITZ,
Defendants.**

Harris County's Original Answer

To the Honorable Sim Lake, United States District Judge:

Harris County files this original answer to plaintiffs' first amended complaint.

Statement of the Case

Kenneth Lucas proffered two difficult choices. Leave him in a cell with his makeshift blade. Or, use the extraction team to get him to the clinic. The plaintiffs pleaded – with hindsight – that the Sheriff’s employees made the wrong choice. But if Mr. Lucas had severed his carotid – with

hindsight – they could as easily argue that detention officers should have removed him to the clinic for treatment.

Mr. Lucas’s physical exertion is obvious during the cell extraction. He suffered from obesity, hypertension, anxiety, and depression.¹ Mr. Lucas died of a heart attack, five-plus minutes **after** he arrived in the clinic. This is the first alleged positional asphyxiation case in American jurisprudence with an on-scene physician and two nurses.

Positional asphyxiation is a discredited theory.² Harris County has no *Monell* liability under the plaintiffs’ best-case scenario. And the claims under the ADA³ and RA⁴ stretch credibility under these facts.

Finally, the selected video frames inserted into the amended complaint violate the rule of optional completeness. Fed. R. Evid. 106. Other portions of the video are necessary to put these frames in context. Rather than insert video clips into this original answer, Harris County will wait to present its evidence in context, in due course.

Jurisdiction and venue are not an issue.

Admissions and Denials

1. Harris County objects to ¶ 19. The paragraph is not a short and plain statement of the claim “limited as far as practicable to a statement of a single set of circumstances” FED. R. CIV. P. 10(b). The rule requires a party to “. . . state its claims or defenses in numbered paragraphs, each limited as far as practicable to a statement of a **single set of circumstances.**” Statements of fact do not

¹ See Doc. 3, Plaintiffs First Amended Complaint, p. 21, ¶ 55.

² *Khan v. Normand*, 683 F.3d 192, 194-96 (5th Cir. 2012); *Pratt v. Harris County, Tex.*, CIV.A. H-12-1770, 2015 WL 224945, at *11 (S.D. Tex. Jan. 15, 2015).

³ Americans with Disabilities Act.

⁴ Rehabilitation Act.

include conclusory statements. **Conclusory statements** express a factual inference without expressing the fundamental facts on which the inference is based.⁵ Instead of asserting averments that the defendant may admit or deny, this paragraph is conclusory argument. **Subject to the objection:** Harris County admits that Mr. Lucas died on February 17, 2014, and was forcibly restrained; but denies the remaining allegations in ¶ 19. In addition, “hogtie” is colloquial, not defined in Black’s Law Dictionary. *But see Weigel v. Broad*, 544 F.3d 1143, 1170 (10th Cir. 2008)

A hog-tie is a restraint technique whereby a person's hands are cuffed behind his back, his feet are bound together, drawn up behind his back and attached to the handcuffs. It results in his ankles being bound to his handcuffed wrists behind his back with twelve inches or less of separation. *Id.* A similar technique is referred to as hobbling. *Id.* at 1188 n. 14. The only difference between the two techniques is the distance between ankles and handcuffed wrists; a separation of twelve inches or less is a hog-tie, a greater distance is a hobble. *Id.*

2. Harris County incorporates, by reference its objection in ¶ 1, above. The plaintiffs’ characterization of statistics as evidence that deputies are “killing detainees” is patently offensive, and intentionally more prejudicial than probative. Harris County denies the remaining allegations in ¶ 20. By explanation - the plaintiffs again violate the rule of optional completeness. Fed. R. Evid. 106. The plaintiffs quote the U.S. Department of Justice – Civil Rights Division “findings” that are merely a notice of claim – lawyer-talk – and are not evidence of wrongdoing. The plaintiffs pleaded these “findings” as truth throughout the complaint - without context. Harris County had an opportunity to respond – under the rules of fundamental due process. Harris County answered the DOJ’s “findings” line-by-line. The response was in-depth, addressing the form and substance of the DOJ’s allegations. Part of Harris County’s defense attacked these “findings” as conclusory,

⁵ *A Dictionary of Modern Legal Usage, Third Edition, Bryan A. Garner, Oxford University Press, 2011.*

and that they failed CRIPA's⁶ notification requirements. Bottom line – the DOJ did not file a lawsuit. Further, the Harris County jail has met – and maintains National CALEA⁷ standards.

3. Harris County incorporates, by reference its objection in ¶ 1, above. Harris County denies the remaining allegations in ¶ 21.

4. Harris County incorporates, by reference its objection in ¶ 1, above. Harris County denies the remaining allegations in ¶ 22.

5. Harris County incorporates, by reference its objection in ¶ 1, above. In addition, Harris County objects to plaintiffs' speculation stated as an averment of fact – “. . . detainees died in the County's jails **undoubtedly due to** failures cited in the 2009 Memorandum.” Harris County denies the remaining allegations in ¶ 23.

6. Harris County admits that the Texas City Police Department arrested Mr. Lucas on February 12, 2014, on a warrant for interference with child custody [not February 14, 2015, as alleged in ¶ 24]. The incident was described as parental kidnapping and bond was set at \$20,000. Harris County denies the remaining allegations, with explanation. Mr. Lucas had previous arrests for assault (four separate cases), Evading Arrest, Harassment, Abandoning/Endangering a Child, Theft, and Interference with Child Custody – in four separate Texas Counties – Harris, Galveston, Brazoria, and Montgomery. He was assigned to Maximum Custody status because of his violent criminal history.

7. Harris County objects to ¶ 25. The paragraph is not a short and plain statement of the claim “limited as far as practicable to a statement of a single set of circumstances” FED. R. CIV. P. 10(b). The paragraph has five sentences alleging disputed issues and argument. And the date wrong, so

⁶ Civil Right of Institutionalized Persons Act (CRIPA).

⁷ Commission of Accreditation for Law Enforcement Agencies (CALEA).

Harris County denies ¶ 25 as alleged; but would add that Mr. Lucas had flooded his cell, ripped a metal smoke-detector cover from the ceiling, and was attempting to sharpen the metal edges on the concrete floor.

8. Harris County adopts by reference the objection in ¶ 1. Harris County admits that the Cell Extraction Team removed Mr. Lucas from his cell using reasonable force; that Mr. Lucas violently resisted; that his finger was broken – and, whether it occurred in the melee is unknown. Harris County denies the remaining allegations in ¶ 26; but adds that the Extraction Team continually asked Lucas to “Stop Resisting!” – “Calm Down!” – and “Don’t Move.” He did not comply.

9. Harris County admits the allegations in the first three sentences of ¶ 27, but denies the hogtie hogwash in the remaining sentences.

10. Harris County denies the conclusory allegations in ¶ 28.

11. Harris County adopts by reference the objection in ¶ 1, and denies all conclusory contentions in ¶ 29. The “statements of fact” sought to be admitted are phrased so that they cannot be admitted or denied without explanation.

12. Harris County adopts by reference the objection in ¶ 1, and denies all conclusory contentions in ¶ 30. The “statements of fact” sought to be admitted are phrased so that they cannot be admitted or denied without explanation. Harris County specifically denies that any member of the extraction team had anything to do with the administration of Ativan – or any other medical decisions for that matter. The entire purpose of the extraction was to get Mr. Lucas to the clinic for help.

13. Harris County admits that Mr. Lucas was in distress, but denies the remaining allegations in ¶ 31.

14. Harris County admits that Mr. Lucas said “I can’t breathe.” But, he continued talking after that, so he was breathing. He continued to talk until he was inside the clinic, under medical supervision. Harris County denies the remaining allegations in ¶ 32.

15. Harris County denies the “hogtie” allegations, but admits that ¶ 33 allegations occurred approximately 5 ½ minutes after the extraction team wheeled Mr. Lucas into the clinic.

16. Harris County adopts by reference the objection in ¶ 1, and denies all conclusory contentions in ¶ 34. The “statements of fact” sought to be admitted are phrased so that they cannot be admitted or denied without explanation.

17. Harris County adopts by reference the objection in ¶ 1, and denies all conclusory contentions in ¶ 35. The “statements of fact” sought to be admitted are phrased so that they cannot be admitted or denied without explanation. Harris County specifically denies that any member of the extraction team had anything to do with the administration of Ativan.

18. Harris County adopts by reference the objection in ¶ 1, and denies all conclusory contentions in ¶ 36. The defendant extraction team members were in a clinic, surrounded by medical personnel, they were responsible to control the inmate, not take his pulse.

19. Harris County denies the allegations in ¶ 37.

20. Harris County denies the allegations in ¶ 38.

21. Harris County denies the allegations in ¶ 39.

22. Paragraph 40 is an incorporation paragraph. Harris County likewise incorporates paragraphs 1 – 18 as if fully restated herein.

23. Harris County denies the allegations in ¶ 41.

24. Harris County denies the allegations in ¶ 42.

25. Harris County denies the allegations in ¶ 43.

26. Paragraphs 44-46 challenge the individual employees' qualified immunity. Qualified immunity is relevant to Harris County's defenses, because there can be no municipal liability if no constitutional violation occurred. The employees are aptly represented in their individual capacities by Assistant Harris County Attorneys Mary Baker and Clinton Gambill. Harris County denies the allegations in ¶ 44-46.

27. Harris County denies the allegations in ¶ 47. The plaintiffs' reliance upon the 2009 DOJ "findings" letter is sorely misplaced. The "findings" letter is a mandatory, statutory precursor to any DOJ lawsuit seeking injunctive relief, and possibly oversight. After Harris County had an opportunity to respond, that lawsuit was never filed. From that day until now, the Harris County Sheriff has worked in cooperation with the U.S. Department of Justice to improve the conditions in the largest jail in Texas and one of the largest in the United States.

28. Harris County denies the "failure to train" allegations, and adopts by reference the objection in ¶ 1, and denies all other conclusory contentions in ¶ 48.

29. Harris County denies the allegations in ¶ 49, and submits that it does not meet the *Twombly*⁸ test. "Threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice"⁹

30. Harris County denies the allegations in ¶ 50.

31. Harris County denies the allegations in ¶ 51.

32. Harris County denies the allegations in ¶ 52.

33. Harris County denies the allegations in ¶ 53.

⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

34. Paragraph 54 is an incorporation paragraph, Harris County likewise incorporates paragraphs 1-34 as if fully restated herein.

35. Harris County admits that the intake medical screening documented Mr. Lucas's, hypertension, anxiety, and depression; but denies the remaining allegations in ¶ 55.

36. Harris County denies the allegations in ¶ 56.

37. Harris County denies the allegations in ¶ 57.

38. Harris County denies the allegations in ¶ 58.

39. Harris County denies the allegations in ¶ 59.

40. Harris County denies the allegations in ¶ 60.

41. Harris County denies the allegations in ¶ 61.

42. Harris County admits the allegations in ¶ 62.

43. Paragraph 63 is an incorporation paragraph, Harris County likewise incorporates paragraphs 1-43 as if fully restated herein.

44. Harris County denies that it is liable in damages to the plaintiffs as alleged in paragraphs 64-66. The plaintiffs have to travel a long road before they can claim attorney fees as a prevailing party under 42 U.S.C. § 1988. And, Harris County is not liable for punitive damages.¹⁰

Jury Demand

45. Harris County also demands trial by jury.

Affirmative Defenses

46. Harris County does not admit any liability by asserting its defenses. Harris County specifically denies all allegations of liability in plaintiffs' lawsuit. The plaintiffs have the burden to prove facts to support their cause of action. The burden of proof does not switch to Harris

¹⁰ *City of Newport v. Fact Concerts*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

County because it pleads defenses. Indeed, the requirement to plead facts sufficient to overcome immunity is the plaintiffs' burden.

47. Harris County asserts the affirmative defense of contributory negligence.

48. Harris County asserts the affirmative defense of assumption of risk.

49. Harris County asserts the affirmative defense of proportionate responsibility.

50. Harris County asserts that the plaintiffs have failed to plead facts sufficient to state a claim under *Monell*.¹¹

51. Harris County asserts its official, governmental, and sovereign immunity and all other protections under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.001 *et seq.*

52. Harris County is not liable for the negligent acts of its employees. The negligent deprivation of life, liberty, or property is not a constitutional violation. *See Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir.), *cert. denied*, 506 U.S. 973, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992); *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir.1989); *Simmons v. McElveen*, 846 F.2d 337, 339 (5th Cir.1988).

53. Harris County is not liable for punitive damages.

54. There can be no municipal liability if no constitutional violation occurred.¹²

55. Harris County Jail Policies and practices are constitutional. Jail officials must have substantial discretion to devise reasonable solutions to the problems they face. Policies and practices needed to maintain order and institutional security are appropriate.¹³

¹¹ *Monell v. Department of Social Serv.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035- 36, 56 L.Ed.2d 611 (1978).

¹² *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

¹³ *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416 (2015).

Attorney Fees

56. Harris County asks the Court to award its reasonable attorney's fees as additional costs under 42 U.S.C. § 1988(b) & (c).

Conclusion

57. Harris County does not permit the violation of citizens' constitutional rights by policy, practice, or custom. The plaintiffs have not identified a policymaker. They have not identified a policy, "moving force" causation, or shown any factual support for deliberate indifference. Their pleadings are platitudes, conclusory statements, and formulaic recitations of the elements of municipal liability. Harris County has no policy that caused Mr. Lucas's, medical condition, bad behavior, or heart attack.

Prayer

Harris County respectfully asks the court to dismiss Mr. Lucas's claims with prejudice, for costs, including attorney's fee and expert witness fees – and for all other relief to which it may be entitled.

Respectfully submitted,

VINCE RYAN
Harris County Attorney

s/ *Fred A. Keys, Jr.*
Fred A. Keys, Jr.
Sr. Assistant County Attorney
State Bar No. 11373900
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5141
Facsimile: (713) 755-8924
fred.key@cao.hctx.net

ATTORNEYS FOR HARRIS COUNTY

CERTIFICATE OF SERVICE

I certify that on September 14, 2015, I served by electronic notice – CM/ECF – all counsel of record with a true and correct copy of Harris County’s First Answer to Mr. Lucas’s First Amended Complaint.

s/ *Fred A. Keys, Jr.*